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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WALTER WILSON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

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QUESTIONS PRESENTED

I

Whether an accused received the effective assistance of counsel when (A) his trial counsel fails, despite a clear constitutional basis for doing so, to perceive, raise and preserve certain critical issues with reference to the various burdens of persuasion involved in the case, and (B) his trial counsel fails to request instructions critical to the defense.

II

Whether the accused was denied due process of law by virtue of the presence of certain fundamental defects in the various instructions under which a murder charge, the included offense of voluntary manslaughter and the issue of self-defense were submitted to the jury.

III

Whether, in determining if the evidence is sufficient to support a finding of guilt beyond a reasonable doubt, the Record itself must support the required determination that a rational juror could convict solely on the basis of the admitted evidence bearing on the elements of the charged offense.

IV

Whether due process is accorded an accused when the trial Judge (1) rejects the request for an evidentiary hearing on his allegation of ineffective assistance of counsel and (2) summarily denies the defense's application for a new trial.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED . . .	i
TABLE OF AUTHORITIES . . .	v
OPINIONS OF THE COURTS BELOW .	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED . . .	2
STATEMENT OF THE CASE . . .	2
ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT . . .	6

ARGUMENT I:

An accused is denied the effective assistance of counsel when (a) his trial counsel fails, despite a clear constitutional basis for doing so, to perceive, raise and preserve certain critical issues with reference to the various burdens of persuasion involved in the case, and (b) his trial counsel fails to request instructions critical to the defense. . . . 7

ARGUMENT II:

An accused can be grievously denied due process of law by virtue of the presence of certain fundamental defects in the various instructions under which a murder charge, the included offense of voluntary manslaughter and the issue of self-defense are submitted to the jury. 18

ARGUMENT III:

In determining if the evidence is sufficient to support a finding of guilt beyond a reasonable doubt, the record itself must support the required determination that a rational juror could convict solely on the basis of the admitted evidence bearing on the elements of the charged offense. . . . 52

ARGUMENT IV:

Due process is denied when the trial judge (1) rejects the request for an evidentiary hearing on an allegation of counsel and (2) summarily denies the defense's application for a new trial without having made any of the critical findings required. . . . 57

CONCLUSION 62

CERTIFICATE OF SERVICE . . . 62

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Alberty v. United States</u> , 162 U.S. 499, at 507-508 (1896)	15
<u>Bollenbach v. United States</u> , 326 U.S. 607 at 611-612 (1946)	38
<u>Brown v. United States</u> , 256 U.S. 335, 343 (19)	56
<u>Carter v. Jago</u> , 637 F.2d 449 (6th Cir. 1980)	27
<u>Commonwealth v. Daniels</u> , 451 PA 163 (1973)	15
<u>Commonwealth v. Johnston</u> , 438 PA 485 (1970)	16
<u>Cupp v. Naughton</u> , 414 U.S. 141, 147 (1973)	41
<u>Cuyler v. Sullivan</u> , 446 U.S. 335, 344-345 (1980)	8
<u>Engle v. Issac</u> , — U.S. —, 100 S. Ct. 1558 (1982)	12, 22
<u>Erwin v. The State</u> , 29 Ohio St. 186 (1875)	11
<u>Hankerson v. North Carolina</u> , 432 U.S. 233, 245 (1977)	23
<u>Hill v. United States</u> , 368 U.S. 424, 428 (1962)	58
<u>Holloway v. McElroy</u> , 632 F.2d 605, 625 (5th Cir. 1980)	21, 30

<u>Hutto v. Davis</u> , 102 S.Ct. 703 (1982)	21
<u>In Re Winship</u> , 397 U.S. 358, 364 (1970)	. 13,20
<u>Isaac v. Engle</u> , 646 F.2d 1129, 1136 (6th Cir. 1980) (concurring opinion)	. 29
<u>Leary v. United States</u> , 395 U.S. 6, 31-32 (1969)	. 41
<u>Morrisette v. United States</u> , 342 U.S. 246 (1952)	. 30
<u>Mullaney v. Wilbur</u> , 421 U.S. 684 (1975)	. 13
<u>Patterson v. New York</u> , 432 U.S. 197, 202-205 (1977)	. 6,20
<u>People v. Patterson</u> , 39 N.Y. 2d 288, 347 N.E. 2d 898, 900 n.1 (1976)	. 31
<u>Sandstrom v. Montana</u> , 442 U.S. 510 (1979)	. 40,50
<u>State v. Miller</u> , 267 N.C. 409 (1966)	. 16
<u>State v. Muscatello</u> , 55 Ohio St. 201 (1978)	. 42,47
<u>State v. Newell</u> , — Ohio App. 2d — ()	. 21
<u>United States v. Beasley</u> , 491 F.2d 687, 696 (6th Cir. 1974)	. 57
<u>United States v. DeCoster</u> , 487 F.2d 1173, at 1204 (D.C. Cir. 1973)	. 61

<u>United States v. Gypsum Co., 438</u> U.S. 442, 429-430 (1978) .	30
<u>Wainwright v. Sykes, 433 U.S. 72,</u> 87 (1977) .	12, 19
<u>Wynn v. Mahoney, 600 F.2d 448, 451</u> (4th Cir. 1979) .	22

RULES AND STATUTES

<u>Ohio Rules of Criminal Procedure,</u> Rule 30 .	19
<u>Revised Code of Ohio, §2901.05</u>	51
<u>Revised Code of Ohio, §2903.03</u>	9, 45
<u>Title 28 U.S.C. §1257(3) .</u>	2

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PETITION FOR WRIT OF CERTIORARI TO THE
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To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court of
the United States:

The petitioner, Walter Wilson, prays
that a writ of certiorari issue to review
the judgment of the Ohio Court of Appeals,
which judgment became final on October
12, 1983 when the Supreme Court of Ohio

denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entries by the Supreme Court of Ohio denying further review are set forth at Appendices "A" and "B" in the Appendix to this Petition.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "C".

STATEMENT OF THE GROUNDS ON WHICH THE
JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on October 12, 1983. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3).

STATEMENT OF THE CASE ^{1/}

The critical facts here are not in serious dispute. They show the petitioner operated a thriving grocery store

1/ References to the transcript of proceedings will be designated by the prefix "R".

business that was located across the street from a Cleaners operated by the decedent. The building in which the decedent's business was located was being sold to the petitioner. During the negotiations leading up to the sale and purchase of this property, the decedent was told by his landlord, the seller, these negotiations were under way and that the new owner would be able to do what he wanted to with the premises (R 34). Indeed, the landlord testified he was the one who actually signed the eviction notice served on the decedent (R 35).

It was established that when the decedent came into the Wilson's store he had the eviction notice with him. Continuing, a typical witness for the State testified as follows:

A He [the decedent] was saying
that -- he wanted to know what

was this envelope for and what does it mean; and Walter was explaining to him that this is business hours for him and he would have to talk with him another time, maybe with his lawyer, and he said he did not want to hear that; and that's when he got loud and began to curse.

Q So Mr. Lumpkin was trying to get information, is that correct?

A Yes.

Q Did Mr. Wilson give him that information?

A He told him he couldn't talk with him right now, this is business hours, and he would have to talk with him, maybe with his lawyers, at a later time. (R 47.)

This witness further revealed it was after the words stopped, the decedent "went for his gun" (R 88). The last thing he said to Wilson before doing this was "motherfuck you" (R 48). Also, according to this witness as to the later events, all she knew was the decedent "pulled the gun and... [she]

heard a shot" (R 49).

Other witnesses verified the events as basically outlined in the above testimony. And, it was shown that the decedent's gun was loaded. This was established by the State through one of the officers who arrived on the scene (R 87-88).

The above factual patterns were amplified by various defense witnesses, including the petitioner himself. The upshot of the evidence, even as postured by isolating the State's presentation, shows Wilson was without fault in provoking the altercation here involved. Indeed, Walter Wilson was on the premises of his store, minding his own business, when the decedent entered and sought him out to argue a legal matter. When Wilson refused to do so, the decedent drew his gun under circumstances that

surely provided Wilson the right to stand his ground and meet deadly force with deadly force. And, that is what he did.

Based on the above evidence, and the charge under which it was submitted to the jury, Walter Wilson was convicted of murder and given a life sentence.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

This being a self-defense case, we, of course, continue to maintain there is a grievous fallacy in our appellate court's assumption that Patterson v. New York, 432 U.S. 197 (1977), authorizes a state to require an accused to prove he acted in self-defense. Also, in this Petition it will be established that our petitioner was not provided the assistance of counsel within the range sufficient to satisfy the requirements of due process.

I. An Accused Is Denied The
Effective Assistance Of
Counsel When (A) His Trial
Counsel Fails, Despite A
Clear Constitutional Basis
For Doing So, To Perceive,
Raise And Preserve Certain
Critical Issues With Refer-
ence To The Various Burdens
Of Persuasion Involved In
The Case, And (B) His Trial
Counsel Fails To Request
Instructions Critical To
The Defense.

In this case, to obtain a murder conviction, the prosecution was required to prove Walter Wilson purposely killed the decedent. The options open to him were (1) to prove he acted in self-defense, or (2) to establish that the killing was the product of extreme

emotional stress brought on in the wake of provocation sufficient to incite the use of deadly force and for that reason was Manslaughter -- at best.

In assaying counsel's performance, the law is now clear, whether trial counsel was retained or appointed is irrelevant. Cuyler v. Sullivan, 446 U.S. 335, 344-345 (1980). What is required, of course, is that counsel's conduct at the trial must be viewed in the context of the totality of circumstances and a determination made as to whether his performance fell below the range of competency generally demanded of attorneys in criminal cases (id., at 344).

Self-defense is based on the concept that the action taken was fully justified. Under the emotional stress "defense", the contention is made that the actor's

conduct should be partially excused. Standing alone, it is clear defense counsel had a difficult enough job of selling to perform since any competent counsel would have been aware that these "defenses" appear to be almost in conflict. This is so because it requires some effort by even well-informed counsel to even convince himself that our voluntary manslaughter statute (§2903.03) does not make it a crime to kill in self-defense. This being so, counsel was surely required to meticulously analyze the various homicide and self-defense instructions involved in this case.

This obligation was magnified by the arguments of the prosecutor that erroneously made it appear the petitioner was under an affirmative duty to actually retreat before resorting to the use of deadly force (R 315). Here we refer to

trial counsel's argument that the State's case "was geared to establishing excessive force" was used. (R 293). Indeed, the State conceded the defendant, in this case, certainly had "the right" in the wake of the circumstances confronting him "to defend himself" (R 310). On the otherhand, as the prosecutor saw it, our petitioner had no right to go any further than that. And, that what was used here was "excessive force" (ibid). Even this is not all, the prosecutor amplified his flawed thesis by rhetorically asking the jury if "killing Lumpkin was the only means of escape available to this defendant" (R 314). This thought was then punctuated by the further argument that unless killing the decedent was his only means of escape, self-defense was not an available defense (R 314).

None of these arguments were objected to although they were erroneous in a most prejudicial way. Nor did counsel request the instruction that Wilson was under no duty to retreat, not only because the decedent's actions constituted an armed attack on him in his place of business, but also because he had the right to meet deadly force with deadly force to a greater degree than would otherwise have been the case. Erwin v. The State, 29 Ohio St. 186 (1875).

In a nutshell, our contention here is that trial counsel's failure to object (to the various defective arguments on self-defense) is no bar to these issues being considered on their merits. For it can hardly be denied that "cause" for a failure to object is surely supplied where the accused had constitutionally ineffective assistance of counsel. See,

Wainwright v. Sykes, 433 U.S. 72, 87
(1977).

Any dispute as to the efficacy of this position is quickly resolved from a reading of Engle v. Issac, ____ U.S. ____, 102 S. Ct. 1558 (1982). There this Court credited the argument that requiring an accused to prove he acted in self-defense raised a "colorable constitutional claim". Granted, in Engle, the Court ruled against the accused on the "cause" aspect of the Wainwright standard. Still it was noted that "if an accused perceives a constitutional claim and believes it may find favor in the Federal Courts he may not bypass the state courts even if he believes they will be unsympathetic to their views" (id., at 1572-1574).

That said, the critical discussion in Engle, so far as this case is concerned, was the Court's stated reasons for

rejecting the cause contentions. First, these were characterized as not limited to futility. Then the Court noted that in the five (5) years since In Re Winship 397 U.S. 358 (1970), was decided, not only had dozens of defendants relied on its language to challenge the constitutionality of rules requiring them to bear the burden of proof on certain issues, but numerous courts had agreed with them. Premised on these points, the Court reasoned that in view of such activity, they could not agree Issac lacked the tools to construct a constitutional claim.

It was this latter point that was emphasized by this Court's specific reference to Mullaney v. Wilbur, 421 U.S. 684 (1975), having been decided "three months before... [Issac's] trial," where the Court had "explicitly acknow-

ledged the link between Winship and constitutional limits on assignments of the burden of proof." Id., at 1572-74, n.42.

For our part, if the above analysis was valid, then the fact that Engle was decided almost three (3) months before this trial must be given critical weight. This is especially so since the Sixth Circuit opinion in Engle had put considerable doubt on the efficacy of our Appellate court's notions on the subject. Thus, there can be no excuse for counsel's failure to raise and perpetuate these issues. That counsel was unaware a colorable constitutional claim could surely have been made as against these charges must then be regarded as the sole reason for his failure to do so.

Another aspect of this issue starts with the prosecutor's argument on a duty

to retreat. It seems clear enough that trial counsel was oblivious to the fact that such an argument was clearly improper here. For the law, simply put, is that where one is dangerously or feloniously attacked, or even threatened with such an attack, in their home or their business premises, they need not retreat and may meet deadly force with deadly force. This principle has come to be known as the "castle" doctrine. See, Alberty v. United States, 162 U.S. 499, at 507-508 (1896). Also see Commonwealth v. Daniels, 451 PA 163 (1973). Simply put, under the doctrine that one's home is his castle, this defendant had the absolute right to protect his business premises against an armed invasion.

For our part, Walter Wilson was entitled to more than the boiler-plate instruction that he was not required to

retreat. Indeed, he was absolutely entitled to instructions that specifically alerted the jury to the fact that where a man is dangerously and feloniously attacked in his place of business and he and/or his customers and employees are placed in imminent danger of serious personal harm or death from an unjustified felonious attack, he would be justified in standing his ground and meeting deadly force with deadly force. Even this is not all, the jury should have been told that such justification could exist notwithstanding he may have been able to safely retreat without suffering any harm from the attack. See, Commonwealth v. Johnston, 438 PA. 485 (1970), and State v. Miller, 267 N.C. 409 (1966).

Simply put a critical circumstance here was created by the fact that the

manner of decedent's invasion of Wilson's business premises which absolutely entitled him to an additional instruction that specifically emphasized his right, independent of his right of self-defense, to affirmatively seek to repel any unlawful invasion of his business premises and to otherwise protect his customers.

The prejudice to the defense caused by the lack of these additional instructions can be related to the fact that there was no proof decedent's intent ever wavered once he pulled the pistol in this crowded store. Since the decedent's aggressive conduct translates into unlawful acts reasonably calculated to produce an affray foreboding injurious or fatal consequences which were not renounced by him, they clearly justified the homicidal response made by Wilson.

II. An Accused Can Be Grievously
Denied Due Process Of Law By
Virtue Of The Presence Of
Certain Fundamental Defects
In The Various Instructions
Under Which A Murder Charge,
The Included Offense Of
Voluntary Manslaughter And
The Issue Of Self-Defense
Are Submitted To The Jury.

In making the various contentions under this Argument, counsel is keenly aware of the requirements that an exception must be taken at trial to preserve an issue for appeal. However, it is our view that as postured by the critical contention (made elsewhere in this Petition), our petitioner lacked the effective assistance of counsel. This being so non-compliance with the preservation rule cannot be a sufficient bar

to the resolution of the merits of this and other serious contentions. For it could not be clearer, the lack of the effective assistance of counsel must be regarded as a sufficient cause for non-compliance where, as here, actual prejudice resulted as would surely be the case since this Rule (Rule 30, Ohio Rules of Criminal Procedure) prevented the Court of Appeals from giving meaningful consideration of critical contentions made in the Brief considered by that court. See Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977).

(A)

A State May Not, Consistent With The Due Process Clause, Impose On A Defendant In A Criminal Trial The Burden Of Persuasion With Respect To The Plea Of Self-Defense.

The federal constitutional limitations on the allocation of a particular burden of persuasion with reference even to what a state may characterize as "affirmative defenses" derive from the rule articulated in In Re Winship, 397 U.S. 358, 364 (1970). There it was held that a criminal defendant may not be constitutionally convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. Under this principle, an "affirmative defense" (such as self-defense) that brings into question, or seeks to negate, an element of the crime charged must, once sufficiently raised by the accused, be disproven beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197, 202-205 (1977). The ultimate logic here, of course, is based on the idea that the State "may not place the burden

of persuasion on [an] issue upon the defendant if the truth of the defense would necessarily negate an essential element of the crime charged." Holloway v. McElroy, 632 F.2d 605, 625 (5th Cir. 1980).

Counsel's serious disagreement with the ad hoc reasoning patterns relied on for the opinion below that the lack of self-defense is not an element the State is required to prove was formulated with a full awareness that "a precedent must be followed by lower courts no matter how misguided the Judges in those courts [or the lawyer, the situation here] may think it to be." Hutto v. Davis, 102 S. Ct. 703 (1982). More specifically, our position is that both Patterson v. New York and State v. Newell, both supra, are only properly regarded as dealing with defenses of mitigation,

such as heat of passion and duress, which go only to the distinction between Murder and Manslaughter. Despite this indisputable fact, the court below simply refuses to reckon with the critical distinction between defenses of mitigation and those of justification, such as a claim of self-defense.

Significantly, the Supreme Court in the Ohio case of Engle v. Issac, ___ U.S. ___, 100 S. Ct. 1558 (1982), has rather pointedly recognized the argument that the prosecution must disprove self-defense to establish mens rea, voluntariness, and unlawfulness as raising "a colorable constitutional claim." Id., at ___ and n.23. See, Wynn v. Mahoney, 600 F.2d 448, 451 (4th Cir. 1979), where it was specifically noted that "the Supreme Court has not yet considered the proper allocation of the burden of

proof with regard to self-defense."

Indeed, in both Hankerson v. North Carolina, 432 U.S. 233, 245 (1977), and Engle v. Issac, supra, the Court expressly articulated the idea that its disinclination to consider whether due process required proof of the lack of self-defense was because that issue was not properly before the Court. This being so, it is at once clear the issue as to the ultimate reach of Patterson can hardly be regarded as settled.

This analysis takes us then to the opinion in State v. Newell, infra, which is now almost invariably being cited in support of the thesis that the State can constitutionally require an accused to prove he acted in self-defense. The fact that the supposed basis for this position is supposed to be Patterson v. New York is, of course, rather start-

ling. This is so because it can hardly be that Patterson is properly regarded as authorizing Ohio to punish as a murderer one who commits an entirely lawful act -- that is, kill another in self-defense. In any event, it is most difficult to understand how principles established in connection with the defense of duress, the situation in Newell, can be deemed controlling in a self-defense analysis.

A study of the appellate court's analysis (in the various cases relied on to defend its thesis) quickly shows they distill into an unconstitutional thesis. Simply stated, the clear cut indications are that that court is convinced that what is to be regarded as elements of any crime can be freely assigned by it or by the Legislature. And, the court must likewise be convinced that

Patterson, although based on a gratuitous mitigation defense, controls even where the defense raised is an absolute one as distinguished from merely a partial defense. Self-defense is not, of course, a confession and avoidance-type defense as was the case in Patterson or Newell. It is this fact that is doubtless being ignored by our appellate court. For if that court is right, the State, simply by the way it defines a particular crime, can make an element out of the lack of intent, or the lack of an act, or even misidentification. Indeed, it can even make it a crime to kill in self-defense, something it has already come very close to doing by making it an offense to purposely cause a death -- which usually is what happens in homicide cases.

Granted, the elements of a particu-

lar offense should be prescribed by the statute itself. This is rightly the role of the legislature even though there is no doubt in anyone's mind that our legislature's penchant is for making guilty verdicts as easy as is imaginable for juries to reach. Thus, the only protection left against outright tyranny when the same is indulged in by a prosecution-oriented legislature or court, is the right of counsel to fearlessly challenge and appeal what he regards as a bad precedent.

For what it's worth, it is fundamental due process that renders it impossible for either the Ohio legislature or our appellate court to make it a crime to kill in self-defense. While this is certainly true, the courts below seem totally oblivious to the fact that the Supreme Court in Patterson, upon

which they claim to rely, made the point that it did "not intend Mullaney" to be "[c]arried to its logical extreme...." Patterson v. New York, 432 U.S. 197, 214-215, n. 15. Yet, history continues to show the court below is quite willing to take the Patterson rationale beyond its "logical extreme."

Our point here, simply put, if this Court agrees with the holding of Carter v. Jago, ^{2/} 637 F.2d 449 (6th Cir. 1980), Ohio can require a defendant to prove self-defense simply by the way it defines the crime involved, and if self-defense can be properly analogized to the gratuitous defense involved in Patterson (which defense arguably could ^{2/} In Carter, the Court justified its rationale by resorting to an ipse dixit analysis. It then arbitrarily concluded that unlawfulness is not an element of any homicide offense to the extent unlawfulness and self-defense coincide. Id., at 456.

be totally eliminated by the simple device of abolishing the statute that created it), then it follows Ohio could eliminate the defense itself and make it a crime to kill in self-defense and this Court should make that point clear.

Fortunately, our Supreme Court has yet to rule directly on the issue as to whether an accused can be required to prove himself not guilty, the situation when self-defense is raised.

The point here being urged is magnified by the following analysis.

First, the mere fact that one fires a gun and thereby kills another does not, alone, establish his guilt of a criminal offense. Next, "murder" and "manslaughter" are specific intent crimes. The intent involved must be proven beyond a reasonable doubt by the prosecution. More simply put, the intent required to

be proven must surely be a criminal intent. Viewed in this light, it makes no sense to argue that one can rightly be required to prove, or suffer a guilty verdict, that he lacked criminal intent. Since the prosecution's burden is always to prove guilt (including the element of criminal intent) beyond a reasonable doubt, that burden is necessarily diluted unless the prosecution is required to prove the existence of such intent.

Obviously then, since the criminal intent aspect of a felonious homicide is irreconcilable with self-defense, it follows that to require an accused to prove his conduct was not criminal is to require him to disprove criminal intent. Issac v. Engle, 646 F.2d 1129, 1136 (6th Cir. 1980) (concurring opinion).

Based on the above analysis, what must be credited here is the fact that

Walter Wilson never contended he did not intend to shoot the decedent. Rather, it was maintained he shot without any criminal intent. See, Morissette v. United States, 342 U.S. 246 (1952), where this Court reasoned that the admittedly intentional act of taking certain government property cannot be supposed by the Court to have been the only intent involved and that the intent the accused admittedly had was only criminal if it was so determined after a consideration of all the testimony (including the defense evidence that the taking had not been with any criminal intent) and all of the acts and circumstances surrounding the taking. Id., at 276. Also see, United States v. Gypsum Co., 438 U.S. 422, 429-430 (1978), and Holloway v. McElroy, 632 F.2d 605, 618 (5th Cir. 1980).

Even this is not all. Our court's reliance on Patterson as authorizing the evisceration of the concept of self-defense cannot survive for other reasons. Here it should be noted the murder statutes under which Patterson was tried expressly provides:

"[I]t is an affirmative defense [to murder] that: "(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." People v. Patterson, 39 N.Y. 2d 288, 347 N.E.2d 898, 900, n.1 (1976).

We also know from the State Court's opinion in the Patterson case that:

"...[T]he [trial] court instructed the jury that '[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree.' The court went on to explain that

'[t]his does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person *** the killing remains a crime, and remains a homicide, but is punishable in less severe manner than murder." Id., at 347 N.E. 2d, at 901.

It is clear then that only be resort to arbitrary reasoning patterns does one fail to recognize there is no valid way to analogize the murder-manslaughter relationship created by the New York statutes with Ohio's murder and manslaughter statutes. In New York (and this was the point critically addressed by the Supreme Court and made clear from the above quotes from the jury charge given in the trial of Patterson), an accused, by proving he acted under an extreme emotional disturbance, only reduced his crime from murder to manslaughter. Patterson, 432 U.S. at 205-206. For our part, it is this

critical point that the courts in Ohio simply refuse to reckon with.

(B)

In A Murder Prosecution,
When The Court Charges The
Jury The Included Offense
Of Voluntary Manslaughter
Must Be Proven Beyond A
Reasonable Doubt, The Effect
Of Such An Instruction Is
To Impose On The Defendant
(Who Would Be The Beneficiary
Of The Instruction) The
Burden Of Proving The Offense
Was Only Manslaughter Beyond
A Reasonable Doubt Or Suffering
A Murder Conviction.

The court in this case specifically advised the jury at various points in its charge as follows:

[1]

Therefore, if you find that the State has proved beyond a reasonable doubt all of the essential elements of the crime of murder, the verdict of course must be guilty. However, if you find that the State of Ohio has failed to prove any one of the essential elements of the crime of murder, you must find the defendant not guilty. If the jury cannot agree, that the State has proved beyond a reasonable doubt that a purposeful killing was committed, then you must begin your deliberations as to the lesser included offense of voluntary manslaughter. (R 342.)

[2]

Voluntary Manslaughter is a lesser included offense of the charge in the indictment; and in Section 2903.03, the Revised Code of the State of Ohio, voluntary manslaughter is knowingly causing the death of another, while under extreme emotional stress, brought on by serious provocation, reasonably sufficient to incite the defendant into using deadly force. (R 342-343.)

[3]

The criminal culpability in the crime of murder is purposely; however, the criminal culpability involved in voluntary manslaughter is knowingly, which is lesser

culpability than purposely.
(R 343.)

[4]

The Court would like to advise you, at this time, neither the State nor the defendant has the burden of proving extreme emotional stress. Only the credible evidence must be raised to establish such circumstances. Ibid.

[5]

Extreme emotional stress is not an element of any offense and need not be proven by either the State or the defendant. (R 345.)

The factual circumstances mitigating the culpable mental state of the defendant. If the jury finds that the defendant acted under extreme emotional stress, the jury will conclude that the defendant knowingly killed the deceased, Quinton Lumpkin, and therefore is guilty of voluntary manslaughter. (Ibid.)

[6]

Therefore, if you find that the State of Ohio has proved each and every element of the lesser included offense of voluntary manslaughter, by evidence beyond a reasonable doubt, your verdict must be guilty of voluntary manslaughter, the lesser included offense; however, if you find that the State of Ohio has failed to prove each and every

element of the offense of voluntary manslaughter by evidence beyond a reasonable doubt; your verdict, of course, must be not guilty of voluntary manslaughter. (R 346.)

[7]

Now, the defendant is asserting the defense of self-defense. The defendant claims that what he did was justified on the basis of self-defense.

The burden of proving the defense of self-defense is upon the defendant, and he must establish such defense by a preponderance of the evidence. (R 346-347.)

[8]

In determining whether or not an issue had been proven by a preponderance of the evidence, you are to consider all of the evidence bearing upon that issue, regardless of who produced it.... If the defendant fails to establish the defense of self-defense, the State still must prove all the elements of the crime charged in the indictment by proof beyond a reasonable doubt.

Therefore, if you find that the State of Ohio has proved beyond a reasonable doubt all of the essential elements of the crime of murder, or the lesser included offense of voluntary manslaughter, and the defendant failed to prove

by a preponderance of the evidence the defense of self-defense, your verdict must be guilty according to your findings. (R 349.)

[9]

However, if you find that the State has failed to prove beyond a reasonable doubt any one of the essential elements of the crime of murder, or the lesser included offense of voluntary manslaughter; or, if you find that the defendant proved by a preponderance of the evidence the defense of self-defense, then you must find the defendant not guilty. (R 350.)

As will be argued below, these instructions, which were repeated (R 364, et. seq.) must be seriously viewed in the light of the special prominence such instructions enjoyed in the minds of jurors. This is so for certain undeniable reasons. One, they were the most recent instructions given; hence, were freshest in their minds. In addition, having been isolated from the other instructions given them, they were received by jurors with heightened

alertness rather than normal attentive-
ness. Thus, it follows that the supple-
mental charges given the deliberating
jury were unavoidably given special
emphasis because they were given in
response to a question from the jury.

For our part, if these instructions
were defective as contended below, then
any ruling adverse to our position has
to also overcome the formidable idea
that "particularly in a criminal trial,
the Judge's last word is apt to be the
decisive word. If it is a specific
ruling on a vital issue and misleading,
the error is not cured by a prior unex-
ceptional and unilluminating abstract
charge." Bollenbach v. United States,
326 U.S. 607, at 611-612 (1946).

As a study of these various and
specific instructions show the court at
various points told the jury manslaughter

was a "lesser included offense of the charge in the indictment [2], that "the criminal culpability involved in... Manslaughter is knowingly which is lesser culpability than purposely" required for murder [ibid]. And, that "neither the State nor the defendant has the burden of proving extreme emotional distress" [4]. Further, they were told "extreme emotional stress is not an element of any offense and need not be proven by either the State or the defendant" [5]. Even this is not all. The court told the jury, following a prefacing statement as to the "circumstances mitigating the culpable mental state of the defendant... [that if] the jury finds the defendant acted under extreme emotional stress, the jury will conclude the defendant knowingly killed the deceased... and therefore is guilty of

voluntary manslaughter [ibid]. Ultimately, the court charged the jury that "if... the State of Ohio has proved each and every element of the lesser included offense of voluntary manslaughter by evidence beyond a reasonable doubt, your verdict must be guilty of the lesser included offense of voluntary manslaughter" [6]. Conversely they were told if the State failed to prove voluntary manslaughter beyond a reasonable doubt their verdict must be not guilty of manslaughter [7].

The standard that must be used in evaluating the constitutional sufficiency of these various instructions is whether a reasonable juror could have interpreted the given charge in a way, or fashion, inconsistent with the Constitution. Sandstrom v. Montana, 442 U.S. 510 (1979). This is so because a charge

susceptible to such an interpretation by a reasonable jury so infects the trial at which it is a part that a conviction rendered subsequent to such charge cannot withstand due process attack, Cupp v. Naughton, 414 U.S. 141, 147 (1973), even if the charge was also capable of being understood by a reasonable jury in a manner that comports with the Constitution. See, Leary v. United States, 395 U.S. 6, 31-32 (1969).

The central problem with the given instructions emerges from the fact that the court, at one point, may very well have correctly informed the jury that "voluntary manslaughter is a lesser included offense of the [murder] charge in the indictment" [2] and if the State failed to prove the elements thereof, their verdict must be not guilty of voluntary manslaughter [6]. At other

points, the court told the jury extreme emotional stress (which is part of our manslaughter statute itself) was not an element of the manslaughter offense [4] and that, in any event, "neither the State nor the defendant has the burden of proving extreme emotional stress " [4].

In all deference, part of the problem here can be traced to the opinion in State v. Muscatello, 57 Ohio App.2d 231 (1977), aff'd 55 Ohio St.2d 201 (1978). For there can be no doubt that, in Muscatello, the manslaughter offense was tortured in an effort to force it into a pattern resembling the "heat of passion" defense, or some other similar type of defense, such as was involved in Patterson v. New York, 432 U.S. 197 (1977). Still, there are certain aspects of Muscatello that make it at once

apparent the instructions given here cannot pass muster and, for that reason a reversal is required.

Drawing on the questions, as phrased by our court in Muscatello, the required determination turns on whether the instruction that the defendant could only be found guilty of "the lesser offense of voluntary manslaughter" if the State proved the defendant committed that offense makes sense. Almost at once, we are faced with what the court aptly recognized in Muscatello -- that is, that "In a case... where the defendant is charged with... murder the State will strive to prove elements of the highest offense and will seek to disprove the mitigating circumstance of emotional stress." Id., 57 Ohio App.2d, 250. Crediting this with being so, since any murder defendant necessarily benefits

from proof of the elements of manslaughter, including the mitigating circumstance of "extreme emotional stress," the effect of this instruction in a murder prosecution is that it requires the defendant to prove beyond a reasonable doubt he was not guilty of murder but only guilty of manslaughter.

Another aspect of our analysis centralizes the trial judge's jury instruction on how the jurors should evaluate the evidence bearing on the crime of manslaughter which, when viewed solely as an included offense in a murder charge (State v. Muscatello) does not include extreme emotional stress as an element. Here, the jury was told extreme emotional stress was merely a circumstance that need only be established by the evidence.

It seems clear, beyond dispute,

from the statute here involved (R.C. of Ohio §2903.03) that "emotional stress" can hardly be classified as a mere circumstance when the crime of manslaughter is viewed in isolation and not as an included offense in a murder charge. It is this fact that makes the Muscatello analysis (by Ohio's appellate courts) almost incomprehensible to those of us who have paused to make a meaningful inspection of its components. For it can hardly be denied, the manslaughter statute itself was clearly intended, by the legislature of Ohio, to make extreme emotional stress an element of the criminal offense described in R.C. of Ohio, §2903.03. And, just as surely, the legislature has to be credited with being both aware that all elements of any criminal offense must be proven by the State and unaware of the gratuitous

defense concept articulated in Patterson
v. New York.

(C)

Where The Trial Judge In A
Murder Prosecution Gives
The Jury A Clearly Erroneous
Instruction, One The Jury
Could Only Reasonably Under-
stand As Telling Them They
Should Not Consider The Lesser
Included Offense Of Manslaughter
If They Were Convinced The
State Had Proved The Charged
Murder Offense, Even If The
Court Elsewhere In Its Overall
Charge Also Gives The Jury
Accurate Instructions
(Rhetorically Inconsistent
With The Incorrect, And Un-
constitutional, Understanding
They Could Have Obtained From

The Erroneous Instruction)
Any Conclusion That The
Charge As A Whole Clearly
Informed The Jury Of The
Correct Legal Principles
Involved Would Be Arbitrary
And Would Violate Due Process.

In dealing with almost the precise issue here being raised, our court has concluded that when "a jury reaches a unanimous determination of guilt to a higher degree of the offense, it can be assumed that they have considered and rejected evidence regarding any defenses or mitigating circumstances," and for that reason the Court having told the jury to cease deliberations, as was done by the Judge in this case [1], was proper. State v. Muscatello, 57 Ohio App. 2d, at 252-254.

Again, in this case, the jury was

told to convict the petitioner of murder if that charge was proved. And, they were told that if they could not agree "that a purposeful killing was committed, then ... begin ... deliberations as to the lesser included offense of voluntary manslaughter [1]." To resolve this issue, the basis of a Muscatello type assumption, would only be valid if the jury necessarily understood they should reject the erroneous instruction and this court is able to conclude they must have resolved the inconsistency between the given instructions by actually rejecting the erroneous one.

This conclusion follows since it is extremely doubtful, even assuming the jury fully understood the Court's charge (dealing with the relationship of manslaughter to murder), they perceived

Wilson could have been found guilty of voluntary manslaughter even if the State first proved he purposely caused the death of the decedent if the evidence showed the killing was only manslaughter because it was done under extreme emotional stress. Stated another way, is it even possible to conclude this jury, despite being told that if they found the State proved beyond a reasonable doubt all the essential elements of the crime of murder the verdict should be guilty [1] and that they should only look to see if the crime involved here was manslaughter "[i]f they could not agree...the State ... proved beyond a reasonable doubt that a purposeful killing was committed" [1], nonetheless considered and rejected the "included offense" of manslaughter.

Even if the Court could possibly

reason the jury ignored these instructions that were truly inconsistent, or at least rhetorically so, with the instructions required here, it simply does not seem possible that the charge as a whole could have left the jury with the correct understanding of the requirements of the law in this situation. See Sandstrom v. Montana, 442 U.S. at 518-519 n.7 and 525-526.

(D)

A State Cannot Constitution-
ally Provide An Accused
With What Amounts To A
Defense To A Criminal Homicide
Charge And Then Require That
It Be Proven Beyond A
Reasonable Doubt By The
Prosecution - Or Even The
Defendant For That Matter.

The arguments made elsewhere in

this Petition aside, the point must be made is that our statute expressly provides with reference to affirmative defenses that to prevail, on the basis thereof, the accused's burden is only that of the preponderance of the evidence. See R.C. of Ohio, §2901.05.

Since the "extreme emotional stress" aspect of the manslaughter charge was so inextricably intertwined with the overall pattern of the evidence the conviction simply cannot be sure that the jury (without the benefit of an instruction directing them to do so) regarded either the emotional stress aspect of the manslaughter statute read to them, or even the manslaughter charge itself when viewed in relation to the murder charge, as in effect providing a mitigating defense.

The fact is when a homicide is committed under the influence of extreme emotional stress such even constitutes a mitigating circumstance that reduces murder to manslaughter. When viewed in this sense manslaughter is rightly classified as a defense in mitigation. Thus it makes no sense at all not to tell, or otherwise explain, this to the jury.

IV. In Determining Whether The Evidence Is Sufficient To Support A Finding Of Guilt Beyond A Reasonable Doubt, The Record Not Only Must Support Any Such Conclusion, It Should Also Show The Required Determination That A Rational Juror Could Convict Solely On The Basis Of The Admitted Evidence Bearing On The Elements Of The Charged Offense.

In this case, Walter Wilson's defense was that he acted to defend himself from death or great bodily harm. As postured by our facts, the critical questions turned on whether, given the quickly unfolding events, his responses were reasonable in the light of the exigencies that existed as interpreted by him. For all the law requires to justify a shooting or killing in self-defense is that the person be confronted with such means of force as induces in them a reasonable belief they are in danger of loss of life or receiving great bodily harm.

The considerable evidence in this case can only be interpreted as showing Wilson was suddenly confronted by an armed intruder in his store. This fact is really beyond dispute (R. 48, 87, 247 and 249). Thus it simply cannot be

denied that the petitioner's apprehension that he would be seriously hurt was at least real to him.

Even this is not all. We certainly agree that one who is merely threatened by a person cannot take the law into his own hands. However, in deciding whether one acted in self-defense, the law simply does not require, in the face of rapidly unfolding events, that they should use unerring judgment.

In making the above contentions, two (2) separate and distinct propositions are being urged. One thesis is that given the evidence showing that the decedent's motives in coming into the petitioner's store, armed as he was, demonstrates the type of conduct that must be viewed as aggressive. This being so, only if the petitioner's belief he was in the appropriate danger

was unreasonable could the self-defense issue be resolved against him. The other thesis is that the State simply failed to prove the killing was unlawful.

Since no one can dispute the fact that if one has reasonable grounds for believing he is in danger of death or great bodily harm from the acts of another he does not commit a criminal act, or an unlawful act, when he picks up a gun to defend himself. This is particularly so when he is in his home or his place of business (the situation here). And just as surey, where as here the evidence, even that offered by the State, establishes the ultimate killing was in direct response an imminent and most threatening deadly attach made against the accused, such proof fails to establish a felonious homicide of any type. This being so, here the conclusion

has to be that the State failed to sustain the burden of proving all the elements of the offense charged in this case.

Again, the critical fact here is that what the decedent was doing when he was shot amounted to felonious aggression toward the petitioner, in his efforts to avoid the possible consequences thereof he was surely justified in standing his ground and destroying the person making the felonious attack. In this regard, the words of the wisest of all Justices are particularly applicable here: "Detached reflection cannot be demanded in the presence of an uplifted knife [or gun]." Brown v. United States, 256 U.S. 335, 343 (19).

Given the facts here, unless this Court is prepared to hold that no over-reaction can ever be countenanced, if

that is truly what happened here, this murder conviction just has to be reversed.

V. Due Process Is Denied When
The Trial Judge (1) Rejects
The Request For An Evidentiary
Hearing On An Allegation Of
Ineffective Assistance Of
Counsel And (2) Summarily
Denies The Defense's Applica-
tion For A New Trial Without
Having Made Any Of The Critical
Findings Required.

It is surely the law everywhere in this Country that an accused by virtue of the Sixth Amendment is absolutely entitled to the effective assistance of counsel. This has been construed to mean the accused is entitled to reasonably effective assistance." United States v. Beasley, 491 F.2d 687, 696 (6th Cir. 1974). It is also the law that a viola-

tion of this right can never be deemed harmless, id., at 696.

The first question that must be dealt with turns on whether the trial Judge's summary denial of a Hearing violated the due process clause of the 14th amendment. First of all, the application for a new trial, alleged fundamental defects of the type that inherently results in a miscarriage of justice and omissions that were inconsistent with the rudimentary demands of fair procedure. Hill v. United States, 368 U.S. 424, 428 (1962).

Next, the trial court's reasons for not allowing an evidentiary hearing is clearly shown in the colloquy between the Court and counsel, which occurred when the Court denied the post trial Motion centralized in this segment of our petition. Here the Record shows the

following colloquy:

THE COURT: ... I think it is strictly a question of the Court of Appeals based on the record whether or not the counsel was incompetent, Mr. Willis.

Otherwise we would, every time there is a conviction in the case, all a new lawyer would have to do is file a motion for incompetency of the lawyer, and the defendant would say, "I told him to do this and he did not do it," and as you know, many times after a trial is over, the defendant will say, "Well, I didn't get a fair trial," or "My lawyer didn't do what I told him to do," or/and vice versa, and we can't go through all of the transactions which go on between counsel and the defendant.

MR. WILLIS: I understand that, and it's for that reason, because the record does not contain the fact that Mr. Wilson told his lawyer this, that we are prepared to have Mr. Wilson testify and he would be able to expand--

THE COURT: Mr. Willis --

MR. WILLIS: I understand what the Court is saying.

THE COURT: Every time a defendant would be found guilty of a major offense, all he has to do is hire a new lawyer and tell the Court that he told the lawyer to do

so and so, or the lawyer told him that he shouldn't do so and so, and he did it, and which would complicate things immensely.

We have more complications, actually, than we should have in a trial of a case, and you are aware of that.

MR. WILLIS: I understand what the Court is saying, but certainly the mere fact that that possibility exists does not mean that it is not a valid contention in some case.

In our view, the above expressed rationale hardly supplies a sufficient basis for resolving the serious issue raised by Wilson's application of a serious contention. For our part, since the claim of ineffective assistance can hardly be deemed frivolous, it has to be that the trial court was required to properly consider and resolve the merits of its critical contentions.

This brings us to the evidence that was proffered as being then available to be offered in support of the application. It is our contention that unless

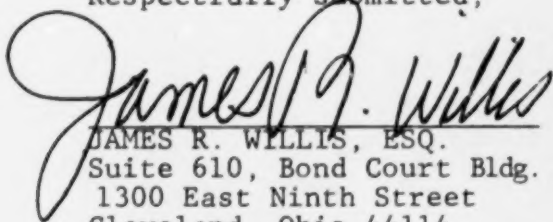
it can be said the evidence proffered was, if true, insufficient as a matter of the due process it cannot be satisfied by simply remitting this petitioner to his appellate remedies.

Distilled, what has been contended here is that Wilson's right to effective assistance was denied by virtue of the ineffective representation that counsel, in fact, rendered. Because the trial court's response to the contentions of ineffective assistance of counsel were so unsound factually, legally and logically; lest silence be interpreted as recognizing the possible validity of any of his points being the basis for this court's ultimate position, we have vigorously expressed the hope this court will follow the teachings of United States v. Decoster, 487 F.2d 1197 (D.C. Cir. 1973).

CONCLUSION

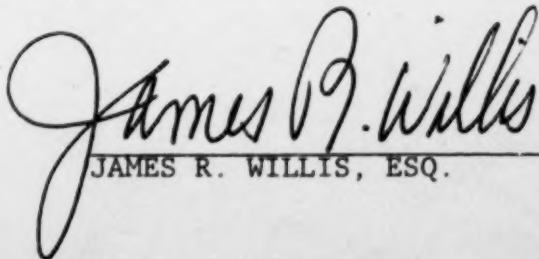
For all of the foregoing reasons it is prayed that the Petition for Writ should be granted.

Respectfully submitted,


JAMES R. WILLIS, ESQ.
Suite 610, Bond Court Bldg.
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 21st day of December, 1983.


JAMES R. WILLIS, ESQ.

A P P E N D I X

TABLE OF CONTENTS

APPENDIX "A"	- Ohio Supreme Court Entry overruling Motion For Leave To Appeal (10/12/83)	A1
APPENDIX "B"	- Ohio Supreme Court Entry dismissing Appeal (10/12/83)	A2
APPENDIX "C"	- Decision and Journal Entry of the Eighth District Court of Appeals (6/23/83)	A3

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)	1983 TERM
)	
City of Columbus.)	To wit: October 12, 1983
State of Ohio,)	No. 83-1277
)	
Appellee,)	MOTION FOR LEAVE TO
)	APPEAL FROM THE
vs.)	COURT OF APPEALS
)	FOR CUYAHOGA COUNTY
Walter Wilson,)	
)	
Appellant.)	

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, \$20.00, paid by James R. Willis

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the
seal of the Court this
_____ day of _____
19__

Clerk

Deputy

APPENDIX "A"

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)	1983 TERM
)	
City of Columbus,)	To wit: October 12, 1983
STATE OF OHIO,)	No. 83-1277
)	
Appellee,)	APPEAL FROM THE
)	COURT OF APPEALS
vs.)	
)	FOR CUYAHOGA COUNTY
Walter Wilson,)	
)	
Appellant.)	

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the
seal of the Court this
day of _____

19____

Clerk
Deputy

APPENDIX "B"

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 45650

STATE OF OHIO

APPEAL FROM

Plaintiff-Appellee

COMMON PLEAS COURT

vs.

NO. 165101

WALTER WILSON

Defendant-Appellant

JOURNAL ENTRY AND OPINION
(Filed June 23, 1983)

Defendant-appellant was tried before a jury and convicted of murder. We affirm for the reasons set forth in this opinion.

Appellant Walter Wilson operated a grocery store located across the street from a cleaners operated by the victim, Quinton Lumpkin. Appellant was buying the building in which the cleaners was located. On the day of the incident, one of the appellant's employees taped an envelope containing an eviction notice on the door of the victim's business establishment.

A few minutes later Lumpkin entered appellant's store. Wilson testified that because he saw a gun in Lumpkin's pocket, he (Wilson) tucked his pistol into the back of his pants. Lumpkin had the envelope in his hand and was angrily questioning Wilson about it. Wilson told Lumpkin that he could not talk to him about it during business hours. Lumpkin became very angry and continued

APPENDIX "C"

arguing and swearing loudly.

Wilson had learned in the neighborhood that Lumpkin had shot and killed a man in the past. Some witnesses, including Wilson, testified that Lumpkin reached for his gun when Wilson pulled out his pistol and fired four times. Three of these shots hit the victim. the victim had crawled behind a wooden potato chip rack to flee and was struggling to his feet. Wilson then picked up his .12 gauge shotgun from the shelf near the cash register and fired it through the shelf. The shotgun bullet hit the victim in the throat and was the only fatal shot fired. The victim had a pistol with bullets that were in the clip (handle) and were not placed in the chamber from which they could be fired. The victim had fired no shots.

Appellant raises several assignments of error.

- I. AN ACCUSED IS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN
(A) HIS TRIAL COUNSEL FAILS, DESPITE A CLEAR CONSTITUTIONAL BASIS FOR DOING SO, TO PERCEIVE, RAISE AND PRESERVE CERTAIN CRITICAL ISSUES WITH REFERENCE TO THE VARIOUS BURDENS OF PERSUASION INVOLVED IN THE CASE, AND
(B) HIS TRIAL COUNSEL FAILS TO REQUEST INSTRUCTIONS CRITICAL TO HIS DEFENSE.

In determining whether a defendant was denied effective assistance of counsel, the Ohio Supreme Court has ruled that the test is whether the accused, under all the circumstances, had a fair

trial and whether substantial justice was done. State v. Hester (1976), 45 Ohio St. 2d 71. This test was further developed by the court in State v. Lytle (1976), 48 Ohio St. 2d 391, where it set forth a two step process:

First, there must be a determination as to whether there has been a substantial violation of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendments rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness. Id. at 396-397.

A licensed attorney is presumed to have competently and properly represented the client. Vaughn v. Maxwell (1965), 2 Ohio St. 2d 299; Lytle, supra. The burden of proving ineffective assistance of counsel is on the defendant and it is a heavy one. State v. Smith (1981), 3 Ohio App. 3d 115. We hold that appellant has not sustained this burden.

Appellant argues that his attorney failed to request the court to instruct the jury that he had no duty to retreat.

The court gave the following instruction:

If a person is assaulted by another, who apparently intended to kill or cause great bodily harm, the person assaulted is not required to retreat, but may repel force with force and kill his assailant, if it reasonably appears to the defendant,

necessary to do so. (R. 347).

Appellant further contends that the prosecutor made statements in his closing argument that led the jury to believe that the appellant had a duty to retreat, and that his counsel's failure to object to these statements amounted to ineffective assistance of counsel. We disagree. The prosecutor prefaced these statements by informing the jury that nothing he said is law. Even if the failure to object had been a violation of the counsel's duty, there was no prejudice to appellant. The court instructed the jury that the law given by the court must be followed and appellant had no duty to retreat. Appellant's testimony indicated that he believed he could not have retreated without receiving serious harm.

Appellant finally argues that his counsel should have requested the court to instruct the jury that where a man is feloniously attacked in his place of business, he would be justified in standing his ground and in using deadly force. We find that the above instruction did inform the jury that if an accused is assaulted with apparent felonious intent, he is justified in standing his ground and in using deadly force. Hence, we find that his counsel did not breach his duty by failing to request an instruction on information already covered by the court.

The first assignment of error is without merit.

II. THE COURT ERRED, AND THE DEFENDANT WAS GREVIOUSLY [sic] DENIED DUE

PROCESS OF LAW, BY VIRTUE OF THE PRESENCE OF CERTAIN FUNDAMENTAL DEFECTS IN THE VARIOUS INSTRUCTIONS UNDER WHICH THE MURDER CHARGE, THE INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, AND THE ISSUE OF SELF DEFENSE WERE SUBMITTED TO THE JURY.

(A)

A STATE MAY NOT CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IMPOSE ON A DEFENDANT IN A CRIMINAL TRIAL THE BURDEN OF PERSUASION WITH RESPECT TO THE PLEA OF SELF DEFENSE.

(D)

A STATE CANNOT CONSTITUTIONALLY PROVIDE AN ACCUSED WITH WHAT AMOUNTS TO A DEFENSE TO A CRIMINAL HOMICIDE CHARGE AND THEN REQUIRE THAT IT BE PROVEN BEYOND A REASONABLE DOUBT BY THE PROSECUTION - OR EVEN THE DEFENDANT FOR THAT MATTER.

These assignments of error are treated together because under each one appellant argues that the Due Process Clause of the United States Constitution is violated when a defendant is required to prove self defense by a preponderance of the evidence. We disagree.

Self defense is an affirmative defense. R.C. 2901.05(C)(2); 1/ State v. Poole (1973), 33 Ohio St. 2d 18. R.C. 2901.05(A) places the burden of proving an affirmative defense by a preponderance of the evidence upon the defendant. Based upon the reasoning in Patterson v. New York (1977), 432 U.S. 197, this court has consistently held that R.C. 2901.05(A) does not unconstitutionally shift the burden of proof to the defendant if the affirmative defense does not negate an essential element of the crime charged. State v. Henderson (Ct. App. Cuy. Cty., December 17, 1981), Unreported Case

1/ R.C. 2901.05 provides in pertinent part as follows:

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

* * *

(C) As used in this section, an "affirmative defense" is either of the following:

* * *

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

No. 43489; State v. Newell (Ct. App. Cuy. Cty., December 28, 1979) Unreported Case No. 470. 2/ The Ohio Supreme Court has also ruled that it is not unconstitutional to require a defendant to prove an affirmative defense by a preponderance of the evidence. State v. Frost (1979), 57 Ohio St. 2d 121, 126-127.

In the case at bar, appellant was charged with murder. The elements of murder are purposely causing the death of another. By asserting self-defense, one admits a purposeful killing but seeks to justify the act. The defense therefore does not negate any elements of the crime. Therefore, it is constitutionally permissible to require an accused to bear the burden of proof by a preponderance, and it is not error to so instruct the jury. Appellant does not refer us to any other "fundamental defects" in the instructions. The first and fourth portions of appellant's second assignment of error are overruled.

II. THE COURT ERRED, AND THE DEFENDANT WAS GREVIOUSLY [sic] DENIED DUE PROCESS OF LAW, BY VIRTUE OF THE PRESENCE OF CERTAIN FUNDAMENTAL DEFECTS IN THE

2/ See also, State v. Jones (Ct. App. Cuy. Cty. March 17, 1983) Unreported Case No. 45236; State v. Washington (Ct. App. Cuy. Cty. October 15, 1981) Unreported Case No. 43219; State v. Johnson (Ct. App. Cuy. Cty. July 16, 1981), Unreported Case No. 42846; State v. Britten (Ct. App. Cuy. Cty. March 27, 1980) Unreported Case No. 40644.

VARIOUS INSTRUCTIONS UNDER WHICH THE MURDER CHARGE, THE INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, AND THE ISSUE OF SELF DEFENSE WERE SUBMITTED TO THE JURY.

(B)

IN A MURDER PROSECUTION WHEN THE COURT CHARGES THE JURY THE INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER MUST BE PROVEN BEYOND A REASONABLE DOUBT, THE EFFECT OF SUCH AN INSTRUCTION IS TO IMPOSE ON THE DEFENDANT (WHO WOULD BE THE BENEFICIARY OF THE INSTRUCTION) THE BURDEN OF PROVING THE OFFENSE WAS ONLY MANSLAUGHTER BEYOND A REASONABLE DOUBT OR SUFFERING A MANSLAUGHTER CONVICTION.

(C)

WHERE THE TRIAL JUDGE IN A MURDER PROSECUTION GIVES THE JURY A CLEARLY ERRONEOUS INSTRUCTION, ONE THE JURY COULD ONLY REASONABLY UNDERSTAND AS TELLING THEM THEY SHOULD NOT CONSIDER THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER IF THEY WERE CONVINCED THE STATE HAD PROVED THE CHARGED MURDER OFFENSE, EVEN IF THE COURT ELSEWHERE IN ITS OVERALL CHARGE ALSO GIVES THE JURY ACCURATE INSTRUCTIONS (RHETORICALLY INCONSISTENT WITH THE INCORRECT, AND UNCONSTITUTIONAL, UNDERSTANDING THEY COULD HAVE OBTAINED FROM THE ERRONEOUS INSTRUCTIONS)

ANY CONCLUSION THAT THE CHARGE AS A WHOLE CLEARLY INFORMED THE JURY OF THE CORRECT LEGAL PRINCIPLES INVOLVED WOULD BE ARBITRARY AND WOULD VIOLATE DUE PROCESS.

Under both parts of this assignment of error, appellant objects to the jury instructions dealing with manslaughter; therefore, the two will be discussed together. Appellant's counsel did not object to these instructions at trial. The failure to timely object to a jury instruction constitutes a waiver thereto. Crim R. 30; State v. Long (1978), 53 Ohio St. 2d 91. Appellant argues that his counsel's failure to object to the instructions was a result of ineffective assistance of counsel; therefore, we should examine the instructions on appeal. A review of the court's charge reveals no prejudicial effect amounting to plain error under Crim. R. 52(B). The instructions complied with the requirements set forth in State v. Muscatello (1977), 57 Ohio App. 2d 231, aff'd., (1978), 55 Ohio St. 2d 201.

In part (C) of this assignment, appellant in very confusing language, appears to argue that the trial court erred in instructing the jury that if it could not agree that the State proved the crime of murder, then it must begin deliberations on manslaughter. We find that the instructions were in accordance with Ohio law. In State v. Muscatello, supra, this court ruled that it is improper for a court to instruct the jury that it must unanimously agree that the defendant is not guilty of

aggravated murder before considering the lesser charge of voluntary manslaughter. No such instruction was given in the case at bar.

The portion of the instruction objected to by appellant was the following statement.

If the jury cannot agree, that the State has proved beyond a reasonable doubt that a purposeful killing was committed, then you must begin your deliberations as to the lesser included offense of voluntary manslaughter. (R. 342)

This court has held that the correct rule of law is that, if a jury is unable to agree unanimously that a defendant is guilty of a particular offense they may proceed to consider a lesser included offense. State v. Muscatello, supra. The second and third sections of appellant's second assignment of error are without merit.

III. THE PROVISIONS OF R.C. OF OHIO, §2901.05(A) TO THE CONTRARY NOTWITHSTANDING, DUE PROCESS IS VIOLATED WHEN THE COURT INSTRUCTS THE JURY THAT THE DEFENDANT MUST PROVE HIMSELF TO BE INNOCENT OF THE CHARGE AGAINST HIM.

Although in this assignment of error appellant states that he was required to prove himself innocent, he actually objects again to the instruction that requires an accused to bear the burden

of proof on the issue of self defense. We ruled under the second assignment of error that the Supreme Court of Ohio has ruled that it is correct to instruct the jury that the defense must prove affirmative defenses by a preponderance of evidence, and we also ruled that self defense is an affirmative defense. This assignment of error is without merit.

IV. THE COURT ERRED IN DENYING THE DEFENDANT'S POST-TRIAL MOTION FOR JUDGMENT OF ACQUITTAL.

A court shall not enter a judgment of acquittal pursuant to Crim. R. 29 (A) if the evidence presented is such that reasonable minds can reach different conclusions as to whether each material element of the crime has been proven beyond a reasonable doubt. State v. Bridgeman (1978), 55 Ohio St. 2d 261. Several witnesses, including appellant, testified about the events leading up to the shooting. Expert testimony and physical evidence were presented. We have reviewed the record and we hold that there was sufficient evidence upon which reasonable minds could conclude that appellant purposely caused the death of Quinton Lumpkin. Thus, there was sufficient evidence that reasonable minds could determine that each material element of the crime of murder was proved beyond a reasonable doubt. The fourth assignment of error is not well taken.

V. THE DEFENDANT WAS DENIED DUE PROCESS WHEN THE TRIAL JUDGE (1) REJECTED THE REQUEST FOR AN EVIDENTIARY HEARING ON AN

ALLEGATION OF INEFFECTIVE
ASSISTANCE OF COUNSEL AND
(2) SUMMARILY DENIED THE
DEFENDANT'S APPLICATION FOR
A NEW TRIAL WITHOUT HAVING
MADE ANY OF THE CRITICAL
FINDINGS REQUIRED.

After the trial a hearing was held on appellant's motions for acquittal and for a new trial. Appellant had requested that his previous counsel withdraw from the case, hence was represented by a different attorney at this hearing. Appellant again argued at the hearing that he was denied effective assistance of counsel because his attorney had not objected at trial to the court's instruction on self defense. Appellant also asserted that his attorney had difficulty hearing the witnesses at trial. There is no evidence in the record that his counsel was unable to hear the testimony. The court found that appellant had been adequately represented and denied the motions.

If the record demonstrates the absence of facts that would entitle the accused to relief for ineffective assistance of counsel, the trial court may so find without granting an evidentiary hearing. State v. Hawkins (Ct. App. Cuy. Cty., March 27, 1980), Unreported Case No. 41101. See also, State v. Perry (1967), 10 Ohio st. 2d 175. We found when ruling on the first assignment of error that there was no evidence in the record of ineffective assistance of counsel. At the hearing for a new trial the lower court stated that it clearly remembered the trial, which had taken place little more than a month

prior to the hearing, and that there was no evidence of ineffective assistance of counsel. At the hearing, appellant almost exclusively based his argument on the fact that counsel had failed to object to the court's instruction that an accused must prove self defense by a preponderance of the evidence. The Supreme Court of Ohio has upheld the charge on affirmative defenses and we have repeatedly followed that ruling (see pp. 5 and 6 of this opinion). We find no error in counsel's failure to object to an instruction of law that has been consistently upheld by the Ohio courts.

Appellant incorrectly relied on United States v. DeCoster (1973), 487 F. 2d 1197 to support his contention that he was entitled to an evidentiary hearing on the issue of ineffective assistance. In that case the record raised serious questions about the counsel's litigation skills, and the court remanded the case back to the trial court for a hearing to investigate counsel's effectiveness. In the case before us, the record of the trial as well as the record of the hearing provide sufficient evidence for a conclusion that counsel adequately represented appellant, and appellant's arguments did not indicate any possibility that information outside the record would demonstrate otherwise. Appellant's final assignment of error is overruled.

The judgment of the lower court is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed. The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

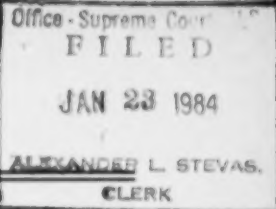
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PATTON, C.J.

NAHRA, J., CONCUR.

JUDGE AUGUST PRYATEL

No. 83-1113



In the Supreme Court of the United States

October Term, 1983

WALTER WILSON,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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COUNTER QUESTION OF LAW

Respondent submits that the question presented by the record in this case is more properly stated as follows:

1. Whether, absent a clear violation of a substantial duty of counsel and actual prejudice resulting therefrom, the petitioner has received effective assistance of counsel.

2(A). Whether the Constitution permits states to place the burden of proving the affirmative defense of self-defense upon the accused.

2(B). Whether a trial court's charge to the jury instructing that voluntary manslaughter is a lesser included offense of murder and that the accused should be convicted of voluntary manslaughter if the evidence shows the accused knowingly caused the death of another while under extreme emotional stress is a proper charge under Ohio law and within the parameters of constitutional due process.

3. Whether the trial court properly denied the accused's post-trial motion for judgment of acquittal when a reasonable jury can reach different conclusions from the evidence as to whether each material element of a crime has been proven beyond a reasonable doubt.

4. Whether the trial court correctly denied a new trial and an evidentiary hearing based upon unsupported allegations of ineffectiveness of counsel.

TABLE OF CONTENTS

Counter Question of Law	I
Objections to Jurisdiction	1
History of the Case	2
Statement of Facts	2
Reasons for Denying the Writ	5
1. Absent a clear violation of a substantial duty of counsel and actual prejudice resulting therefrom, the petitioner was not denied the effective assistance of counsel	5
2(A). The Constitution permits states to place the burden of proving the affirmative defense of self-defense upon the accused	8
2(B). The trial court's charge to the jury instructing that voluntary manslaughter is a lesser included offense of murder and that the accused should be convicted of voluntary manslaughter if the evidence shows the accused knowingly caused the death of another while under extreme emotional stress is a proper charge under Ohio law and within the parameters of constitutional due process	14
3. The trial court properly denied the accused's post-trial motion for judgment of acquittal when a reasonable jury can reach different conclusions from the evidence as to whether each material element of a crime has been proven beyond a reasonable doubt	17
4. The trial court correctly denied a new trial and an evidentiary hearing based upon unsupported allegations of ineffectiveness of counsel	18
Conclusion	21

TABLE OF AUTHORITIES

Cases

<i>Beasley v. United States</i> , 491 F.2d 687 (6th Cir., 1974)	5
<i>Engle v. Isaac</i> , 71 L. Ed. 2d 783 (1982)	8, 11, 20
<i>In re Winship</i> , 397 U.S. 358 (1970)	11
<i>Krzeminski v. Perini</i> , 614 F.2d 121 (6th Cir., 1980), cert. den., 449 U.S. 866 (1980)	13
<i>Leland v. Oregon</i> , 343 U.S. 790 (1952)	12, 13
<i>Moore v. United States</i> , 432 F.2d 730 (3rd Cir., 1970)	5
<i>Mullaney v. Wilbur</i> (1975), 421 U.S. 684	11
<i>Patterson v. New York</i> (1977), 432 U.S. 197	11, 12, 13
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932)	5
<i>State of Ohio v. Walter Wilson</i> (Cuy. Cty. App., June 23, 1983), Unreported Case No. 45650	8, 14
<i>State v. Bridgeman</i> , 55 Ohio St. 2d 261 (1978)	17
<i>State v. Britten</i> (Ct. App. Cuy. Cty., March 27, 1980), Unreported Case No. 40644	11
<i>State v. Davis</i> , 8 Ohio App. 3d 205	8, 10, 11, 13, 20
<i>State v. Durkin</i> , 66 Ohio St. 2d 158 (1981)	16
<i>State v. Frost</i> , 57 Ohio St. 2d 121 (1979)	10
<i>State v. Hawkins</i> (Ct. App. Cuy. Cty., March 27, 1980), Unreported Case No. 41101	19
<i>State v. Hester</i> , 45 Ohio St. 2d 71 (1976)	6, 7
<i>State v. Johnson</i> (Ct. App. Cuy. Cty., July 16, 1981), Unreported Case No. 42846	11
<i>State v. Jones</i> (Ct. App. Cuy. Cty., March 17, 1983), Unreported Case No. 45236	11
<i>State v. Long</i> (1978), 53 Ohio St. 2d 91	14
<i>State v. Lytle</i> , 48 Ohio St. 2d 391 (1976)	6, 7
<i>State v. Melchior</i> , 56 Ohio St. 2d 15 (1978)	7

IV

<i>State v. Muscatello</i> , 57 Ohio App. 2d 231 (1977) <i>aff'd</i> , 55 Ohio St. 2d 201 (1978)	15, 16
<i>State v. Perry</i> (1967), 10 Ohio St. 2d 175	19
<i>State v. Poole</i> , 33 Ohio St. 2d 18 (1973)	9
<i>State v. Robbins</i> , 58 Ohio St. 2d 74 (1979)	7
<i>State v. Smith</i> (Cuy. Cty. Ct. App., December 17, 1981), No. 43499	6
<i>State v. Solomon</i> , 66 Ohio St. 2d 214 (1981)	16
<i>State v. Washington</i> (Cuy. Cty. Ct. App., October 15, 1981), Unreported Case No. 43219, <i>cert. den. sub</i> <i>nom.</i> , <i>Washington v. Ohio</i> , U.S., 73 L. Ed. 2d 1319 (1982)	9, 11
<i>United States v. DeCoster</i> (1973), 487 F.2d 1197	20
<i>United States v. Decoster</i> , 624 F.2d 196, <i>cert. den.</i> , 100 S. Ct. 302 (1979)	5, 6
<i>United States v. Twomey</i> , 510 F.2d 634 (7th Cir., 1975)	5
<i>Vaughn v. Maxwell</i> , 2 Ohio St. 2d 299 (1965)	6

Constitutional Provision, Statutes and Rules

U.S. Const., Amend. VI	5
Ohio Rev. Code § 2901.05	9
Ohio Rev. Code § 2901.05(A)	10
Ohio Rev. Code § 2903.01	2
Ohio Rev. Code § 2903.02	2
Ohio Rev. Code § 2903.03	8
Ohio Crim. R.:	
29	18
30	14
33	18
33(A)	18
52(B)	14

No. 83-1113

In the Supreme Court of the United States

October Term, 1983

WALTER WILSON,
Petitioner,

VS.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

To: The Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the convictions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right

for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

Defendant-petitioner, Walter Wilson, was indicted by a Cuyahoga County Grand Jury for the aggravated murder of Quinton Lumpkin, a violation of Ohio Revised Code, Section 2903.01. The indictment was amended to charge murder, a violation of Ohio Revised Code, Section 2903.02. After a trial by jury, petitioner was found guilty of murder and sentenced to fifteen years to life in prison.

On June 23, 1983, the Eighth District Court of Appeals affirmed petitioner's conviction and sentence. Petitioner Wilson filed a Memorandum seeking jurisdiction in the Supreme Court of Ohio. The State Supreme Court denied jurisdiction on October 12, 1983. The present petition for writ of certiorari to the Eighth District Court of Appeals followed.

STATEMENT OF FACTS

The evidence adduced at trial is as follows:¹

Petitioner Walter Wilson operated a grocery store located across the street from a cleaners operated by the

1. References to the transcript of the proceedings will be designated by the prefix "R".

victim, Quinton Lumpkin (R. 25). For several months prior to the murder, Wilson had been attempting to buy the building in which the victim's business was located (R. 33). He had arranged to purchase the building on condition that the victim and his business be evicted (R. 267). On May 29, 1981, the petitioner sent one of his young employees over to tape an eviction notice on the victim's front door. Moments later, the victim entered the petitioner's store to find out who left the notice and what it was about (R. 192-193). The petitioner was in the office of his store when he saw the victim enter (R. 247). The petitioner then picked up a .38 caliber revolver, concealed it behind his back, and went out to talk to the victim (R. 248). Lumpkin had the envelope in his hand and was angrily questioning Wilson about it. Wilson told Lumpkin that he could not talk to him about it during business hours. Lumpkin became very angry and continued arguing and swearing loudly. Wilson denied knowing anything about the eviction notice (R. 193-194).

Although all of the eyewitnesses were friends or employees of the petitioner, there was considerable disagreement as to what, if anything, the victim did. Some witnesses, including the petitioner, testified that Lumpkin reached for his gun when Wilson pulled out his pistol; other testimony indicated that only the petitioner went for his gun (R. 229). Nevertheless, Wilson reached behind his back, pulled out his revolver, and began firing. He fired four shots from his revolver taking a few seconds between each shot to re-aim (R. 51). Wilson hit the victim with three of his four shots. One shot went through the victim's upper left arm, shattering the bone. Another slammed into the victim's right pelvis, knocking him to the floor face down and the third shot was fired into the victim's left buttock as he laid on the floor with

his feet toward the petitioner (R. 152-153, 159). A fourth shot fired by the petitioner missed the victim and wounded a bystander in the petitioner's store (R. 230). The petitioner then set the revolver on the counter and retrieved his .12 gauge shotgun (R. 53). In those moments, the victim had been able to retreat behind a wooden shelf and was struggling to his feet (R. 207). Wilson said nothing but picked up his shotgun and fired it at the victim's face. The shotgun blast ripped through the wooden shelves that the victim was hiding behind and into the victim's face and throat (R. 151-153, State's Exhibits 7-28). This was the only fatal shot fired (R. 40-47).

When the police arrived, they found the victim's automatic handgun on the floor. Although the pistol had bullets in the clip (handle), there was no bullet in the firing chamber.

When questioned by the police, petitioner claimed he had killed Lumpkin because "he had that gun" (R. 87), although he never stated that the victim had drawn the weapon or even threatened the petitioner. At trial, the petitioner denied ever having aimed at the man whom he had shot four times (R. 256).

After hearing the testimony of the coroner, the police, the eyewitnesses and the petitioner, and after viewing the physical evidence, the jury found the petitioner guilty of murder. This conviction was appealed to the Court of Appeals, Eighth District, Cuyahoga County, which affirmed the judgment of the trial court on June 23, 1983.

REASONS FOR DENYING THE WRIT

1. Absent a clear violation of a substantial duty of counsel and actual prejudice resulting therefrom, the petitioner was not denied the effective assistance of counsel.

Petitioner, in rather opaque language, seems to argue that he was denied effective assistance of counsel because his trial counsel failed to request a jury instruction to the effect that petitioner had no duty to retreat. Petitioner also seems to argue that his trial attorney should have objected to certain remarks by the prosecutor during final argument. Petitioner's claim of ineffective assistance of counsel are unsupported and unsupportable. Petitioner's first argument is meritless and does not warrant Supreme Court review.

Since the Supreme Court's decision in *Powell v. Alabama*, 287 U.S. 45 (1932), there has been an expansion of the scope of the Sixth Amendment right to counsel. However, this expanding scope has not been accompanied by a clear articulation of what level of effectiveness is guaranteed by the Constitution. Various formulations have been pronounced by the Courts: Counsel should exercise customary skill and knowledge which normally prevails at the time, *Moore v. United States*, 432 F.2d 730, 736 (3rd Cir., 1970); a minimum standard of professional representation, *United States v. Twomey*, 510 F.2d 634, 641 (7th Cir., 1975); reasonably effective assistance of counsel, *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir., 1974). The United States Court of Appeals of the District of Columbia, in *United States v. Decoster*, 624 F.2d 196 (1976), *cert. den.*, 100 S. Ct. 302 (1979), announced a standard by which to gauge effective assistance of coun-

sel: that the claimed inadequacy was a serious incompetency falling measurably below the performance ordinarily expected of fallible lawyers. *Id.* at 206.

The test in Ohio as to whether an individual has been denied effective counsel was initially set forth in *State v. Hester*, 45 Ohio St. 2d 71, 79 (1976). The Ohio Supreme Court formulated the following test:

Balancing the rights of the accused and the public, we hold the test to be whether the accused, under all the circumstances . . . had a fair trial and substantial justice was done.

The Ohio Supreme Court further defined the standard in *State v. Lytle*, 48 Ohio St. 2d 391 (1976). The Court promulgated a two-step process that should be employed by courts considering allegations of ineffective assistance of counsel:

First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.

Lytle, at 396.

In Ohio, a properly licensed attorney is presumed to be competent. *Vaughn v. Maxwell*, 2 Ohio St. 2d 299 (1965). Thus, the burden of proof of ineffective assistance of counsel is on the accused. This burden is a heavy one. *State v. Smith* (Cuy. Cty. Ct. App., December 17, 1981), No. 43499. It is well settled that, to meet this burden, an accused must show (1) that counsel has substantially violated an essential duty to the accused and (2) that the

accused was thereby prejudiced. *State v. Lytle, supra*; *State v. Hester, supra*. Petitioner has completely failed to satisfy either of these criteria.

Even assuming some factual or legal basis for petitioner's arguments, it is clear, first of all, that the court's charge dealt with petitioner's right to use deadly force (this, despite the lack of evidence that the victim had done so and the ample evidence petitioner used excessive force). The fact is that the Court charged the jury:

If a person is assaulted by another, who apparently intended to kill or cause great bodily harm, the person assaulted is not required to retreat, but may repel force with force and kill his assailant, if it reasonably appears to the defendant, necessary to do so. (R. 347.)

There was no need and no duty upon trial counsel to request an instruction that Wilson had no duty to retreat. Even if there were a duty, failure to request the instruction caused no prejudice to petitioner since the court gave a substantially similar instruction anyway.

Petitioner's point of lawyer ineffectiveness during the State's closing argument also fails to show any violation of a substantial duty or any resulting prejudice. As the Court of Appeals noted in affirming this conviction, the prosecutor prefaced his closing remarks with a statement that they were not law (although they were legally correct).²

2. In *State v. Melchior*, 56 Ohio St. 2d 15 (1978), the Ohio Supreme Court held that to meet a claim of self-defense, the defendant must show he was not at fault in creating the situation giving rise to the affray, that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from the danger was the use of deadly force, and that the defendant did not violate any duty to retreat. Accord, *State v. Robbins*, 58 Ohio St. 2d 74 (1979).

Moreover, the court's subsequent charge corrected any possible error. The trial court instructed the jury that the law given by the court must be followed and that Wilson had no duty to retreat. Thus, even assuming a substantial violation of duty, there was clearly no prejudice to the petitioner. See *State of Ohio v. Walter Wilson* (Cuy. Cty. Ct. App., June 23, 1983), Unreported Case No. 45650, at 4. Walter Wilson has failed to demonstrate ineffective trial counsel throughout his appellate process. His first assertion does not merit review by this Supreme Court and should be dismissed.

Finally, petitioner relies on a misinterpretation of *Engle v. Isaac*, 71 L. Ed. 2d 783 (1982), which deals with Ohio self-defense statute as it existed from 1974 to 1977—prior to appellant's trial. Currently, in Ohio, the crime of Murder is defined by Ohio Revised Code, Section 2903.03 which clearly *does not* include the absence of self-defense as one of its elements. When an accused, therefore, asserts an affirmative defense as a justification for an otherwise unlawful act, the burden of proof can be constitutionally shifted to the accused. *State v. Davis*, 8 Ohio App. 3d 205. This issue is raised in petitioner's second proposition; the state's response is discussed in more detail there.

2(A). The Constitution permits states to place the burden of proving the affirmative defense of self-defense upon the accused.

Petitioner raises essentially the same issues in his assertions II(A) and (D); therefore, both will be addressed together.

Before addressing petitioner's second claim, the state would like to point out that this assignment of error attacking the placement of the burden of proof for self-

defense has been brought before this Supreme Court by this defense counsel on a previous occasion, and the Petition for Writ of Certiorari was denied. *State v. Washington* (Cuy. Cty. Ct. App., October 15, 1981), Unreported Case No. 43219, cert. den. sub. nom., *Washington v. Ohio*, U.S., 73 L. Ed. 2d 1319 (1982). The Petition for Writ of Certiorari in Walter Wilson's case should likewise be denied.

The petitioner's due process rights were not violated by requiring him to prove by a preponderance of the evidence that he acted in self-defense. In Ohio, self-defense is an affirmative defense. *State v. Poole*, 33 Ohio St. 2d 18 (1973). The Ohio legislature has placed the burden of proving self-defense upon the accused in Ohio Revised Code, Section 2901.05:

§ 2901.05 Burden and degree of proof.

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

* * * * *

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

Thus, the State legislature has mandated that the burden of justifying a murder with a claim of self-defense be on the defendant.

The Ohio Supreme Court has held that it is not unconstitutional to require a defendant to prove an affirmative defense by a preponderance of the evidence. *State v. Frost*, 57 Ohio St. 2d 121, 126-127 (1979). Further, it has been held that Ohio Revised Code, Section 2901.05(A) does not unconstitutionally shift the burden of proof to a defendant if the defense does not negate an essential element of the crime charged. *State v. Davis*, 8 Ohio App. 3d 205 (1982). In *Davis*, defense counsel (the same person acting as defense counsel in the instant petition) alleged the same constitutional violation, i.e., that the State should have the burden of proving that an accused did not act in self-defense. In overruling Davis's assertion and affirming his conviction, the Appeals court stated:

This court has repeated- [209] ly held that Ohio's criminal code constitutionally assigns that burden of proof to the defense. Those decisions have never suggested that a defendant asserting self-defense has the burden of proving himself innocent. Rather, self-defense is an affirmative defense which justifies otherwise unlawful conduct; the absence of that justification is not an element of crimes set forth in R. C. Chapter 2903. Cf. *State v. Frost* (1979), 57 Ohio St. 2d 121 [11 O.O. 3d 294]..

In *Engle v. Isaac* (1982), 71 L. Ed. 2d 783, the United States Supreme Court stated, at page 797, that the argument against this assignment of the burden of proof asserts "a colorable constitutional claim." However, the court's opinion concluded at page 795:

"A careful review of our prior decisions reveals that this claim is without merit. Our opinions suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime. Compare *Mullaney v. Wilbur* [(1975), 421 U. S. 684], *supra*, with *Patterson v. New York* [(1977), 432 U. S. 197], *supra*." (footnote omitted.)

Davis, at 208, 209. The *Davis* court's ruling is based on a logical interpretation of *Isaac*, *Mullaney* and *Patterson* and is consistent with many cases which have previously addressed the self-defense issue.³ Placing the burden of proving self-defense upon the person claiming self-defense does not violate constitutional due process. Petitioner's second claim lacks constitutional merit.

Petitioner's claim seems to be based upon an erroneous reading of *Patterson* and *Isaac*. Petitioner tries to distinguish *Patterson* as "dealing with defenses of mitigation" and not with *complete* defenses (Petitioner's petition, at 21-22). While this Court held that the prosecution must prove every element of a charged offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), it did not require the State to:

prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an *exculpatory* or mitigating circumstance affecting the degree of culpability or severity of the

3. See also, *State v. Jones* (Ct. App. Cuy. Cty., March 17, 1983), Unreported Case No. 45236; *State v. Washington* (Ct. App. Cuy. Cty., October 15, 1981), Unreported Case No. 43219, cert. den. sub nom., *Washington v. Ohio*, U.S., 73 L. Ed. 2d 1319 (1982); *State v. Johnson* (Ct. App. Cuy. Cty., July 16, 1981), Unreported Case No. 42846; *State v. Britten* (Ct. App. Cuy. Cty., March 27, 1980), Unreported Case No. 40644.

punishment. *Patterson, supra*, at 207. (Emphasis added.)

The Court specifically distinguished affirmative defenses (which do not negate the elements of a crime but rather raise a separate exculpatory issue) from the elements themselves (which constitutionally must be proved by the State):

Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. *Proof of the nonexistence of all affirmative defenses has never been constitutionally required*; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. *Patterson*, at 210. (Emphasis added.)

Patterson does apply to cases such as the present, in which complete (as well as mitigating) defenses are raised, and does not require that the state prove the non-existence of self-defense. The trial court committed no error in instructing the jury that the defendant, Walter Wilson, must prove by a preponderance of the evidence that he acted in self-defense.

This Supreme Court has in fact held that the burden of proving an affirmative defense may be placed on the person asserting the defense. In *Leland v. Oregon*, 343 U.S. 790 (1952), this Court upheld an Oregon statute requiring the defendant to prove the defense of insanity be-

yond a reasonable doubt. The standard of proof for self-defense in the instant case, by a preponderance of the evidence, is by far a less cumbersome burden on an accused than was the burden of proof for insanity approved in *Leland*.

Additionally, the Sixth Circuit Court of Appeals, following *Patterson*, held that a defendant may constitutionally be required to prove an affirmative defense. *Krzeminski v. Perini*, 614 F.2d 121 (6th Cir., 1980), cert. den., 449 U.S. 866 (1980). In *Krzeminski*, the defendant attacked the validity of having to prove his defense of insanity. In affirming the conviction, the Sixth Circuit directly applied the *Patterson* holding:

Patterson makes it clear that so long as a jury is instructed that the State has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. *The State may properly place the burden of proving affirmative defenses such as self-defense, extreme emotional disturbance or insanity upon the defendant.*

Krzeminski, at 123. (Emphasis added.)

In the present case, the jury was correctly instructed that the State had the burden of proving every element of the crime beyond a reasonable doubt. Under *Patterson*, *Krzeminski* and *Davis*, therefore, this jury charge was correct. The charge placing the burden of proving self-defense was also correct. Petitioner's conviction should be sustained.

In the case at bar, petitioner was charged with murder. The elements of murder are purposely causing the death of another. By asserting self-defense, one admits a purposeful killing but seeks to justify the act. The defense therefore does not negate any elements of the crime.

Therefore, it is constitutionally permissible to require an accused to bear the burden of proof by a preponderance. It was not error to so instruct the jury.

2(B). The trial court's charge to the jury instructing that voluntary manslaughter is a lesser included offense of murder and that the accused should be convicted of voluntary manslaughter if the evidence shows the accused knowingly caused the death of another while under extreme emotional stress is a proper charge under Ohio law and within the parameters of constitutional due process.

Petitioner's assertions 2(B)(C) raise the same issue and will therefore be discussed together.

At the outset, it should be noted that petitioner's counsel did not object to the now complained of instructions at trial. The failure to timely object to a jury instruction constitutes a waiver thereto. Ohio Crim. R. 30; *State v. Long* (1978), 53 Ohio St. 2d 91. Petitioner argues, however, that his counsel's failure to object to the instructions was a result of ineffective assistance of counsel, therefore, this Court should examine the instructions despite the waiver. A review of the court's charge revealed no prejudicial effect amounting to plain error under Ohio Crim. R. 52(B). *State of Ohio v. Walter Wilson* (Cuy. Cty. Ct. App., June 23, 1983), Unreported Case No. 45650, at 11. Thus, this issue has been waived and should be dismissed.

Assuming *arguendo* that petitioner had properly preserved this claim for appeal, the assertion should still be dismissed. The trial court's instruction to the jury was quite proper under Ohio law and well within the parameters of constitutional due process. The very issue raised

by petitioner here was raised and overruled in *State v. Muscatello*, 57 Ohio App. 2d 231 (1977), *aff'd*, 55 Ohio St. 2d 201 (1978).

In essence, the two issues raised by the petitioner are: 1) that the court's charge on manslaughter was error even though it complied with *Muscatello* and 2) the court erred in its two instructions on considering manslaughter even though the first instruction complied with *Muscatello* and the second instruction also complied with what petitioner would have requested initially.

In petitioner's brief on pages 33-39, he takes exception to the following instructions:

- 1) That manslaughter was a lesser included offense of (murder);
- 2) That the criminal culpability involved in manslaughter is knowingly, which is lesser culpability than purposely;
- 3) That neither the State nor the defendant has the burden of proving extreme emotional distress; and,
- 4) That extreme emotional stress is not an element of any offense and need not be proven by either the State or the defendant.

The *Muscatello* case clearly refutes the allegation of error on all four points. In regard to the first point, voluntary manslaughter is a lesser included offense of murder, *Muscatello* at 236. The degree of culpability for manslaughter is *knowingly*, *Muscatello* at 236. Finally, emotional stress is not an element of voluntary manslaughter, but is a mitigating circumstance for which the defense bears the burden of producing some evidence. *State v. Muscatello*, at 245.

In regard to the manner in which the jury was instructed to deliberate on the charges of murder and manslaughter, the jury was charged, initially, in a manner consistent with *Muscatello*, and after submitting a jury question which requested "a copy of definition of 'manslaughter' and 'murder'", the court again read its charge on both murder and manslaughter to the jury.

Petitioner contends that it is improper to charge a jury that, if they unanimously agree that the elements of murder have been proven beyond a reasonable doubt, they must return a verdict of guilty on that charge. The court instructed that if they cannot unanimously agree on murder, then they must go on to consider voluntary manslaughter (R. 342).

This very issue on the identical charge was decided by the Court of Appeals and affirmed by the Ohio Supreme Court in *State v. Muscatello*. In that case, it was held that, "In reality the jury will not consider each offense upon which it has been charged in isolation from the other offenses because it will be aware of the inter-relationship of the offenses to each other. . ." *Muscatello*, at 252. That reasoning is particularly applicable in the case at bar in which the jury correctly reviewed the law on murder and manslaughter on two separate occasions.

The instructions given to the jury complied with Ohio law and the requirements of due process. Petitioner Wilson's attempt to discredit the rationale of *Muscatello* is unconvincing in light of the fact that several cases have declined the opportunity to overrule or limit *Muscatello*.⁴

4. See e.g. *State v. Durkin*, 66 Ohio St. 2d 158 (1981); *State v. Solomon*, 66 Ohio St. 2d 214 (1981).

There was no error in the instructions regarding the elements of murder or voluntary manslaughter. Petitioner's assertion has neither substantive nor procedural merit.

3. The trial court properly denied the accused's post-trial motion for judgment of acquittal when a reasonable jury can reach different conclusions from the evidence as to whether each material element of a crime has been proven beyond a reasonable doubt.

The denial of petitioner's post-trial motion for judgment of acquittal was proper. In Ohio, it is unrefutable that where the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt, a motion for acquittal shall not be granted. *State v. Bridgeman*, 55 Ohio St. 2d 261 (1978). By ignoring some very critical facts in evidence (such as returning with a .12 gauge shotgun to pump more bullets into an already downed man), petitioner makes this ludicrous claim. The evidence in the case at bar was clearly sufficient to justify the trial court's overruling of petitioner's motion. The unrefutable evidence before the jury was that only the petitioner had fired any firearms; the victim's firearm could not be fired because there were no bullets in the chamber; the petitioner took time to fire and re-aim between every shot; and the final pistol shot struck the victim in the buttock as he lay face down on the floor with his feet toward the petitioner. The evidence further established that the petitioner then left the immediate area and returned *minutes later* with a .12 gauge shotgun. At that time, the victim was hiding behind a wooden shelf and the petitioner then fired the fatal shot through the shelf into the victim's face. The victim's gun was found on the floor, unfired and still with no bullets in the chamber.

His face was splintered with the wood of the bookcase he had been hiding behind when he was murdered. Clearly, these facts and the remainder of the record warranted the court in overruling any motion for acquittal due to the grossly disproportionate use of force by the petitioner. They also support the jury's guilty verdict. No error having occurred at the trial level which warrants Supreme Court review, certiorari should be denied.

4. The trial court correctly denied a new trial and an evidentiary hearing based upon unsupported allegations of ineffectiveness of counsel.

Despite the contention of petitioner that the trial judge rejected the request for an *evidentiary hearing* on an allegation on ineffective assistance of counsel, the fact remains that such a request was never made. In the hearing held on July 22, 1982, counsel for petitioner specifically requested a judgment for acquittal pursuant to Criminal Rule 29 and he requested a new trial pursuant to Criminal Rule 33. As grounds for those motions, petitioner had cited ineffective assistance of counsel, but neither Criminal Rule 29 nor Criminal Rule 33(A) is a vehicle for that contention.

Criminal Rule 33(A) provides:

(A) Grounds

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

- (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the State;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

(5) Error of law occurring at the trial;

(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial.

* * * * *

Clearly, petitioner has not touched upon any of these criteria and had no foundation for the type of motions he was requesting. If the record demonstrates the absence of facts that would entitle the accused to relief for ineffective assistance of counsel, the trial court may so find without granting an evidentiary hearing. *State v. Hawkins* (Ct. App. Cuy. Cty., March 27, 1980), Unreported Case No. 41101. See also, *State v. Perry* (1967), 10 Ohio St. 2d 175. Even with that limitation, however, counsel for petitioner was still given the opportunity to proffer into the record the evidence he would have solicited. There was no error in denying the petitioner a new trial or an evidentiary hearing.

Furthermore, the record negates any contention of ineffective assistance of counsel for two reasons. First, the

trial record itself is void of any instance of a substantial breach of duty on the part of the defense lawyer or any prejudice to his client. (See State's response to Assignment I.) Second, petitioner cannot now contend that there would be collateral evidence of ineffective assistance of counsel because counsel for petitioner had the opportunity to put on the record what that evidence would be. That proffer by petitioner merits further attention. On the record, at the conclusion of his proffer, trial counsel stated, ". . . we offered the proffer as to the essence of what Mr. Wilson would testify to, and I'm satisfied with the posture of the record" (Supp. R. 13). In his proffer, counsel for petitioner talked almost exclusively about his concern that there was no objection to the charge that the defendant must prove an affirmative defense with a preponderance of evidence. That that issue did not prejudice the petitioner is obvious from *State v. Davis* and *Engle v. Isaac*. (See State's response to Assignment 2.) There was no other allegation of prejudice or breach of duty in the proffer, nor has any been cited in petitioner's petition to this Court than has already been discussed.

Petitioner incorrectly relies on *United States v. DeCoster* (1973), 487 F.2d 1197 to support his contention that he was entitled to an evidentiary hearing on the issue of ineffective assistance. In that case the record raised serious questions about the counsel's litigation skills, and the court remanded the case back to the trial court for a hearing to investigate counsel's effectiveness. In the case before us, the record of the trial as well as the record of the hearing provide sufficient evidence for a conclusion that trial counsel adequately represented petitioner, and petitioner's arguments did not indicate any possibility that information outside the record would demonstrate otherwise. Petitioner's final assignment of error should be overruled.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by this Court. The Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

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